Pentadbir Tanah Daerah Kota Tinggi v Siti Zakiyah bte Sh Abu Bakar & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01–12 OF 2003(J)
ABDUL MALEK AHMAD PCA, PS GILL AND ALAUDDIN FCJJ
13 OCTOBER 2005

Civil Procedure — Appeal — Appeal to Federal Court — Adducing fresh evidence — Discretion of Federal Court — Whether applicants could show that High Court judge's decision had occasioned injustice to them

Land Law — Acquisition of land — Market value — Assessment of — Whether High Court erred in assessing market value of agricultural land with reference to value of residential bungalow lots

Land Law — Acquisition of land — Methods of valuation — Whether High Court erred in applying 'projection' method — Whether High Court ought to have adopted the 'comparison' method

The respondents were the registered proprietors of the scheduled land. The freehold tenured land was acquired by the appellant for a third party development. The respondents were paid RM0.38 per square feet (psf) as compensation, making a total of RM360,554. At the request of the respondents, the matter was referred to the High Court which concluded that the market value for the scheduled land was RM4.80 psf. The total amount of compensation was thus increased to RM4,521,528. The appellant appealed against the High Court's award. The respondents filed an application vide encl 24(a) to produce several documents as additional or new evidence in the appeal.

Held, dismissing the respondents' application with costs but allowing the appellant's appeal:

(1) The documents sought to be produced by the respondents were not new evidence. The documents were evidence available to them at the hearing of the land reference before the High Court judge but never produced. The respondents had failed to show the Federal Court that the High Court judge's decision had occasioned any injustice to them (see paras 8–9, 12).

(2) In the instant case, the High Court judge had employed the 'projection method' in arriving at the market value of the scheduled land. However, in the instant case there three other pieces of land furnished as comparables for the judge's comparison. These three pieces of land were the best comparables and should have been considered by the High Court judge, since the comparables: (i) were in the same area or locality as the scheduled land; (ii) shared the same category of land use as the scheduled land; (iii) were approximately the size as the scheduled land; and (iv) were transacted one year prior to the acquisition

of the scheduled land. The High Court judge's failure to adopt the 'comparison method' thus amounted to a misdirection which fatally affected his decision in the valuation of the scheduled land (see paras 55, 58–64).

(3) The High Court judge erred in law and in fact when he held that the value of the land in the vicinity had increased instantly because of the approval given for a tourist centre. Such finding of fact was not supported by any evidence and remained a mere presumption on his part (see paras 65–66).

(4) In assessing the value of the scheduled land, the government valuer had positively taken into consideration its potential for development. It was thus wrong for the High Court judge to have held that the valuer had failed to take into account the potential of the scheduled land in assessing its value (see para 72).

(5) The High Court judge erred in law and in fact when he based his assessment on the sale of bungalow lots in Sebana Resort to arrive at the market value of the scheduled land. His assessment was wrong, unfounded and arbitrary for the following reasons: (i) the bungalow lots did not possess the same similarities as the scheduled land and were not proper comparables; (ii) the scheduled land was agricultural, mostly covered with secondary jungle and around 40% waterlogged; (iii) the transformation of the bungalow lots took place between 1994 and 1995 whereas the valuation by the appellant's valuer was on 30 December 1993 and the respondent's valuation on 7 December 1995; (iv) the bungalow lots were much smaller compared to the scheduled land; (v) the sale of the bungalow lots took into consideration the infrastructure and the amenities already developed for the tourist centre whereas the scheduled land was still agricultural and accessible only by a laterite road; and (vi) there were several other payments expended in connection with the bungalow lots which need not be expended for the scheduled land (see paras 73, 76–80).

(6) The 'projection method' employed by the High Court judge was not a suitable and proper method in the circumstances of the instant case. It resulted in a great disparity in terms of the market value between the scheduled land and the 'comparables'. Such a result would certainly cause injustice to the appellant (see para 81).

[Bahasa Malaysia summary

Responden-responden merupakan tuanpunya berdaftar tanah berjadual. Tanah pegangan bebas diperoleh oleh perayu untuk pembangunan pihak ketiga. Responden-responden telah dibayar RM0.38 satu kaki persegi (skp) sebagai pampasan, yang berjumlah keseluruhannya RM360,554. Atas permintaan responden-responden, perkara tersebut telah dirujuk ke Mahkamah Tinggi yang memutuskan bahawa nilai pasaran untuk tanah berjadual itu adalah RM4.80 skp. Keseluruhan jumlah pampasan oleh itu meningkat kepada RM4,521.528. Perayu telah merayu terhadap award Mahkamah Tinggi. Responden-responden telah memfailkan satu permohonan melalui lampiran 24(a) untuk mengemukakan beberapa dokumen sebagai keterangan tambahan atau baru dalam rayuan itu.]

Diputuskan, menolak permohonan responden-responden dengan kos tetapi membenarkan rayuan perayu:

(1) Dokumen-dokumen yang dipohon untuk dikemukakan oleh responden-responden bukan keterangan baru. Dokumen-dokumen tersebut adalah keterangan yang sedia ada kepada mereka semasa perbicaraan rujukan tanah di hadapan hakim Mahkamah Tinggi tetapi tidak dikemukakan. Responden-responden telah gagal untuk menunjukkan kepada Mahkamah Persekutuan bahawa keputusan hakim Mahkamah Tinggi tidak adil terhadap mereka (lihat perenggan 8–9, 12).

(2) Dalam kes semasa, hakim Mahkamah Tinggi telah menggunakan 'projection method' untuk mendapatkan nilai pasaran tanah berjadual itu. Bagaimanapun, dalam kes semasa, terdapat tiga keping tanah lain untuk dibandingkan oleh hakim. Ketiga-tiga keping tanah tersebut adalah perbandingan terbaik dan patut dipertimbangkan oleh hakim Mahkamah Tinggi, memandangkan perbandingan tersebut: (i) terletak di kawasan atau tempat yang sama seperti tanah berjadual tersebut; (ii) dalam kategori kegunaan tanah yang sama seperti tanah berjadual tersebut; (iii) lebih kurang anggaran luas sama seperti tanah berjadual tersebut; dan (iv) berlaku transaksi satu tahun sebelum perolehan tanah berjadual tersebut. Kegagalan hakim Mahkamah Tinggi untuk menggunakan 'comparison method' itu telah menyebabkan salah arah yang menjejaskan keputusan beliau dalam penilaian tanah berjadual tersebut (lihat perenggan 55, 58–64

(3) Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta apabila beliau memutuskan bahawa nilai tanah dalam kawasan tersebut telah meningkat serta merta kerana kelulusan yang telah diberikan kepada sebuah pusat pelancongan. Penemuan itu tidak disokong oleh apa-apa keterangan dan hanya andaian semata-mata di pihak beliau (lihat perenggan 65–66).

(4) Dalam penegasan nilai tanah berjadual tersebut, jurunilai kerajaan secara positif telah mempertimbangakan potensi pembangunan tersebut. Oleh itu adalah salah untuk hakim Mahkamah Tinggi memutuskan bahawa jurunilai telah gagal untuk mengambilkira potensi tanah berjadual tersebut semasa menaksirkan nilainya (lihat perenggan 72).

(5) Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta berdasarkan penegasan beliau berhubung jualan lot-lot bungalow di Sebana Resort dalam mendapatkan nilai pasaran tanah berjadual tersebut. Penegasan beliau adalah salah, tidak berasas dan dibuat sewenang-wenangnya berdasarkan alasan-alasan berikut: (i) lot-lot bungalow itu tidak memiliki persamaan seperti tanah berjadual dan bukanlah perbandingan yang betul; (ii) tanah berjadual tersebut bersifat pertanian, kebanyakan daripada kawasan diliputi hutan sekunder dan 40% ditakungi air; (iii) transformasi lot-lot bungalow berlaku antara tahun 1994 dan 1995 manakala penilaian oleh jurunilai perayu adalah pada 30 Disember 1993 dan penilaian responden pada 7 Disember 1995; (iv) lot-lot bungalow lebih kecil berbanding dengan tanah berjadual tersebut; (v) jualan lot-lot bungalow mengambilkira infrastruktur dan kemudahan awam yang telahpun dibangunkan untuk pusat pelancongan manakala tanah berjadual tersebut masih bersifat pertanian dan hanya boleh dilalui dengan

jalan laterit.; dan (iv) terdapat beberapa bayaran lain yang dibelanjakan berkaitan lot-lot bungalow tersebut yang tidak perlu dibelanjakan untuk tanah berjadual tersebut (lihat perenggan 73, 76–80).

(6) 'Projection method' yang digunakan oleh hakim Mahkamah Tinggi bukan cara yang sesuai dan dan betul dalam keadaan kes semasa. Ia mengakibatkan perbezaan ketara berdasarkan nilai pasaran antara tanah berjadual tersebut dan 'comparables' tersebut. Kesan sedemikian pastinya menyebabkan ketidakadilan kepada perayu (lihat perenggan 81).

Notes

For a case on methods of valuation, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1767.

For cases on appeal to Federal Court, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index, paras 680–684.

For cases on market value, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1738–1765.

Cases referred to

Bertam Consolidated Rubber Co Ltd v Collector of Land Revenue Province Wellesley [1984] 1 MLJ 164 (refd)

Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1 (refd)

Collector of Land Revenue v Alagappa Chettiar [1971] 1 MLJ 43 (refd)

Collector of Land Revenue v Ong Thye Eng and cross appeals [1971] 1 MLJ 43 (refd)

Collector of Land Revenue, Kuantan v Noor Chahaya bte Abdul Majid [1979] 1 MLJ 180 (refd)

Lee Chee Cheng & Ors. v Pentadbir Tanah Daerah Seberang Perai Tengah, Bukit Mertajam [1999] 4 MLJ 213 (refd)

Malakoff Bhd & Anor v Pentadbir Tanah, Kedah [2000] 2 MLJ 140 (refd)

Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17 (refd)

Megat Najmuddin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)

Nanyang Manufacturing Co v The Collector of Land Revenue, Johore [1954] 20 MLJ 69 (refd)

New Serendah Rubber Co Ltd v Collector of Land Revenue, Kuala Lumpur [1981] 2 MLJ 344 (refd)

Ng Tiou Hong v Collector of Land Revenue, Gombak [1984] 2 MLJ 35 (refd)

Siah Brothers Plantation Sdn Bhd v Pentadbir Tanah dan Daerah Kuantan [1993] 3 MLJ 51 (refd)

Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co Ltd [1966] 1 MLJ 243 (refd)

Legislation referred to

Evidence Act 1950 ss 126 and 129
Rules of the Federal Court 1995 r 137

Yaacob Hj Md Sam (Johor Legal State Adviser) for the appellant.
Dato' R Rajasingham (S Gunapatti and Sri Kumar with him) (Gunapathi Suppiah & Co) for the respondents.

Alauddin FCJ (delivering judgment of the court):

BACKGROUND

[1] This is an appeal in respect of a land reference under s 37 of the Land Acquisition Act 1960 ('the Act') heard and decided by the High Court at Johor Bahru vide Land Reference No 15–859 of 1996 on16 October 1997.

[2] The respondents had earlier filed a notice of motion dated 11 October 2004 (encl 24(a)) requesting that several documents be produced as additional or new evidence in the appeal.

[3] Enclosure 24(a) was accompanied by a supporting affidavit dated 7 October 2004. There was an affidavit in reply by the appellant dated 30 November 2004. The respondents further replied by their affidavit dated 7 January 2005.

[4] We thought it was appropriate to hear encl 24(a) first and we proceeded to do so.

ENCLOSURE 24(a)

[5] By way of this application, the respondents sought to produce in all six documents as new evidence in the appeal.

[6] It was their contention that these documents were neither known nor available to them or their solicitors at the hearing of the land reference before the High Court. Further, the Federal Court has the inherent powers to hear any application or make any order as may be necessary to prevent injustice under r 137 of the Rules of the Federal Court 1995 (see *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1 and *Megat Najmuddin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385).

[7] For ease of reference, we would list out all the six documents. They are:

(i) joint venture agreement dated 17 September 1992 between Netcoin Sdn Bhd and Yayasan Pelajaran Johor (exh 'SHT-1');

(ii) valuation report by Raja Hamzah & Associates to Yayasan Pelajaran Johor dated 17 July 1992 (exh 'SHT-3');

(iii) valuation report by Raja Hamzah & Associates to Netcoin Sdn Bhd dated 17 July 1992 (exh 'SHT-4');

(iv) letter from the State Legal Adviser, Johor ('the SLA') to Messrs Soh Yok Lam & Co dated 30 April 2003 (exh 'SHT-5');

(v) letter from YPJ Holdings Sdn Bhd to Messrs Gunapati Suppiah & Co dated 25 April 2001 (exh 'SHT-7(A)');

A (vi) letter from Sebana Holdings Sdn Bhd to the Deputy Executive Chairman of YPJ Holdings Sdn Bhd dated 12 April 2001 (exh 'SHT-10').

[8] The learned SLA, who appeared for the appellant argued that, in so far as these documents are concerned, they are not new evidence. As a matter of fact, they were
B available to the respondents at the hearing of the land reference before the High Court.

[9] For instance, exhs 'SHT-1, 3 and 4' were available to the respondents but they failed to adduce them before the High Court.

C

[10] The valuation reports by Raja Hamzah & Associates were not specifically prepared for the purpose of the land reference under the Act but more for the purpose of reflecting on the commercial viability of the scheduled land in other ventures.

D **[11]** Exhibit 'SHT-5', the letter from the SLA, was written under a 'Without Prejudice' cover and it was therefore a 'privileged' document and no permission was obtained from the SLA to produce them (see *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17 and ss 126 and 129 of the Evidence Act 1950).

[12] It was further argued by the learned SLA that the respondents have failed to
E satisfy this court that the learned trial judge's decision had occasioned any injustice to them to enable this court to exercise its discretion to invoke its inherent powers under r 137 of the Rules of the Federal Court 1995.

[13] On the contrary, the learned trial judge's decision was very much in the
F respondents' favour and it is their duty to defend it.

[14] Having heard submissions from both parties, we were inclined to agree with the submission of the learned SLA that the documents sought to be produced by the respondents are not new evidence as such but were evidence available to them at the
G hearing of the land reference before the learned trial judge but never produced.

[15] On the exercise of our discretion under r 137, we share the view of the learned SLA that the respondents have failed to satisfy us that the trial judge's decision had occasioned any injustice to them.

H **[16]** In the result, we dismissed encl 24(a) with costs.

[17] We then proceeded to hear the appeal.

I

THE APPEAL

Factual background

[18] The scheduled land involved in the land reference before the learned judge is Lot 1063 (CT1776) Mukim Pengerang, Daerah Kota Tinggi.

[19] The total area acquired is 21a 2r 20p (21.624 acres) which is the whole property. The said acquisition was carried out for the benefit of Yayasan Pelajaran Johor (YPJ) who had entered into a joint venture agreement with one Netcoin Sdn Bhd (MSB) dated 17 September 1992 to incorporate a joint venture company to be known as Sebana Holdings Sdn Bhd for the sole purpose of developing the combined land of approximately 1199.9057 acres, in the Mukim of Pengerang, District of Kota Tinggi, Johor, into a 'Holiday Resort'.

[20] The respondents are the registered proprietors of the scheduled land.

[21] The scheduled land is accessible from Kota Tinggi town via Jalan Mawai, the Kota-Tinggi-Sungai Rengit mainroad (also known as Desaru mainroad) for a distance of about 60km and thereafter via a metalled service road leading to the Sebana Resort. Further approach is via a motorable laterite road for a short distance.

[22] Geographically, the scheduled land is about 65km to the south east of Kota Tinggi town centre.

[23] The scheduled land adjoins the western boundary of Sebana Resort. The site is generally flat in terrain and is at about the same level with the metalled road within Sebana Resort.

[24] Sebana Resort is an outgoing integrated tourism development which comprises a golf course, marina club house, berths and board maintenance facilities and exclusive residential developments.

[25] At the time of acquisition, the site was partly cleared and partly overgrown with trees at its southwestern portion. Part of the northern portion of the land was waterlogged.

[26] Other properties in the immediate vicinity include mainly agricultural land cultivated with oil palm and rubber trees as well as fruit trees.

[27] The nearest local centre is Pekan Sungai Rengit which is about 10km to the south of the scheduled land. Kota Tinggi town which is located about 65km north-west of the scheduled land is the main commercial and administrative centre for the area and the district.

[28] The tenure of the scheduled land is 'freehold' and the category of land use is 'agriculture'.

[29] For the said acquisition, the compensation awarded by the appellant was RM16,370 per acre (RM0.38psf) making a total of RM360,554.

[30] Dissatisfied with the above award of compensation, the respondents requested that the matter be referred to the High Court and on 3 August 1996, the land administrator referred the matter to High Court Johor Bahru and the same was registered as Johor Bahru High Court Land Reference No15–859 of 1996.

[31] The learned trial judge having heard arguments and considered the authorities furnished by both sides came to the conclusion that the market value for the scheduled land was RM4.80psf. The total award came to RM4.521,528 (an increase from RM0.38psf to RM4.80psf).

[32] The appellant, now appeals to this court against the award made by the learned trial judge.

Grounds of appeal

[33] The learned trial judge's decision was attacked on the following grounds:

(a) the learned trial judge erred in law and in fact in holding that the market value of the scheduled land known as Lot 1063 (CT 1776), Mukim Pengerang, District of Kota Tinggi is at RM4.80psf. In so holding, the award is manifestly excessive and does not reflect the true market value of the scheduled land. And in consequence, there was a tremendous increase of RM4.521,528 from the award of the appellant at RM360,554 for the scheduled land (an increase from RM0.38psf to RM4.80psf);

(b) the learned trial judge erred in law and in fact in failing to employ the safest, most reliable and most suitable 'comparison method' and instead used the 'projection method' which is unknown, unacceptable and unreliable in assessing the market value of the schedule land;

(c) the learned trial judge erred in law and in fact in failing to use the 'comparison method' which was accepted by both valuers for the appellant and the respondents. Hence, he failed to consider and to accept the comparables submitted by the appellants, ie Lots PTD 61, PTD 62 and PTD 774;

(d) the learned trial judge erred in law and in fact when he held that the value of the comparables did not reflect the true market value of the scheduled land although the comparables adduced were, in every aspect, similar to the scheduled land especially in terms of location, size, time and their physical features. Furthermore, Lot 774 was a common comparable;

(e) the learned trial judge erred in law and in fact in failing to consider all the relevant factors in assessing the market value of the scheduled land especially the category of land use which was 'agriculture' at the material date of acquisition;

(f) the learned trial judge erred in law and in fact when he held that the value of land within the vicinity had increased instantly because of the approval given for the development of a tourist centre known as Sebana Resort even though there was no evidence as such;

(g) the learned trial judge erred in law and in fact when he held that the appellant's valuer failed to consider the potential of the scheduled land for development as a tourist centre although this factor was clearly taken into account by him;

(h) the learned trial judge erred in law and in fact when he based his assessment on the sale of bungalow lots in Sebana Resort in order to arrive at the market value of the scheduled land. His assessment was clearly wrong, unfounded and arbitrary.

The respondent's argument

[34] In response to the attack on the learned trial judge's decision by the appellant, learned counsel for the respondents contended that the learned trial judge had considered every factor in order to determine the market value of the scheduled land and has given his reasons for rejecting the purported comparables used by the appellant's valuer.

[35] It was further submitted by learned counsel that the trial court was entitled to arrive at its own valuation based on the available evidence (see *New Serendah Rubber Co Ltd v Collector of Land Revenue, Kuala Lumpur* [1981] 2 MLJ 344). Further, the learned trial judge was entitled to make his own independent assessment of the market value (see *Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co Ltd* [1966] 1 MLJ 243 (FC)).

[36] The learned trial judge had correctly assessed the market value of the scheduled land with its development potential in accordance with the First Schedule to the Act and the accepted practice of the courts in the country.

[37] Section 1 of the First Schedule to the Act merely provides the relevant date when the market value of the scheduled land should be determined but it does not provide for any particular method of determining the market value (see *Bertam Consolidated Rubber Co Ltd v Collector of Land Revenue Province Wellesley* [1984] 1 MLJ 164 (FC)).

[38] The appellant's complaint that the 'projection method' is unknown, unacceptable and unreliable in ascertaining market value is misconceived and without basis (see *Malakoff Bhd & Anor v Pentadbir Tanah, Kedah* [2000] 2 MLJ 140 and *Superintendent of Lands and Surverys, Sarawak v Aik Hoe & Co Ltd*).

[39] The learned trial judge has gone into this matter thoroughly in the light of the evidence and submissions presented before him as is clear from his long and careful judgment.

A **[40]** For the above reasons, learned counsel urged upon us to uphold the assessment of the learned trial judge and not interfere with his conclusion (see *Bertam Consolidated Rubber Co Ltd v Collector of Land Revenue Province Wellesley*).

COURT'S FINDINGS

B

[41] Before we proceed to consider the grounds of appeal, I think it is timely that we remind ourselves of our duties and functions with regard to appeals of this nature which involve land valuation.

C **[42]** In doing so, we can do no better than to refer to the words of Lord Diplock in the Privy Council in *Collector of Land Revenue v Alagappa Chettiar* [1971] 1 MLJ 43; *Collector of Land Revenue v Ong Thye Eng and cross appeals* [1971] 1 MLJ 43.

[43] At p 44 of the report, this is what his Lordship said:

D

> The appeal to the Federal Court under s 49 of the Land Acquisition Act 1960 is like any other civil appeal, by way of re-hearing. The Federal Court is entitled to review the inferences and conclusions of the High Court and to draw its own inferences and conclusions: *Aik Hoe & Co Ltd v Superintendent of Lands and Surveys*. But where the
> **E** inferences and conclusions of the High Court are based upon findings of primary fact which are dependent upon the credibility of the oral evidence of witnesses whom the trial judge alone has had the advantage of hearing and seeing, an appellate court ought to accept the High Court's findings of primary fact save in very exceptional cases. Similarly where expert oral evidence of valuers has been called at the trial and discloses a conflict of opinion between them, the judge's finding as to which he regarded as most reliable is entitled to
> **F** considerable weight though it is less sacrosanct than his findings of pure fact which are dependent upon his view of whether or not particular witnesses were telling the truth. Finally, their Lordships would observe that land valuation inevitably involves an element of appreciation and impression. There is room for divergence of opinion. As in the case of appeals against assessments of damages or against apportionment of blame in actions for negligence an appellate court ought not to reject the judge's assessment and to embark upon
> **G** a fresh valuation of its own unless it is satisfied for good reason that the judge's assessment must be wrong.

[44] That decision was followed by the then Supreme Court in *Siah Brothers Plantation Sdn Bhd v Pentadbir Tanah dan Daerah Kuantan* [1993] 3 MLJ 51.

H

[45] Guided by the above decision, we shall now consider the grounds of appeal.

Grounds (a), (b), (c), (d) and (e)

I **[46]** On these grounds, the submission of the learned SLA was that the learned trial judge erred in law and in fact in failing to employ the safest, most reliable and most suitable 'comparison method' and instead used the 'projection method'which is unknown, unacceptable and unreliable in assessing the market value of the scheduled land.

[47] The court in arriving at the market value of the scheduled land will have to apply certain principles according to the facts and circumstances of a particular case. What are the principles involved? A

[48] The Federal Court in *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35 at p 37 considered the following as the main principles: B

> First, market value means the compensation that must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The elements of unwillingness or sentimental value on the part of the vendor to part with the land and the urgent necessity of the purchaser to buy have to be disregarded and cannot be made a basis for increasing the market value. It must be treated on the willingness of both C the vendor to sell and the purchaser to buy at the market price without any element of compulsion. Secondly, the market price can be measured by a consideration of the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions. Thirdly, its potentialities must be taken into account. The nature of the land and the use to which it is being put at the time of the acquisition have to be taken into account together with the likelihood to which it is reasonably capable of being put to use in the future e.g. D the possibility of it being used for building or other developments. Fourthly, in considering the nature of the land regard must be given as to whether its locality is within or near a developed area, its distance to or from a town, availability of access road to and within it or presence of a road reserve indicating a likelihood of access to be constructed in the near future, expenses that would likely be incurred in levelling the surface and the like. Fifthly, estimates of value by experts are undoubtedly some evidence but too much weight should E not be given unless it is supported by, or coincides with other evidence (see *Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co Ltd* [1966] 1 MLJ 243, *Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302 and *Nanyang Manufacturing Co v Collector of Land Revenue, Johore* [1954] MLJ 69.

[49] Further down the judgment the court continued: F

> The safest guide is evidence of sales of similar lands of similar quality or position in the locality at or prior to the time of acquisition. The prices paid for such sales can be used as comparables subject to making allowances for all the circumstances.

G

[50] That the learned trial judge had employed the 'projection method' in arriving at the market value of the scheduled land is much reflected in his judgment at pp 27–28 of the appeal record. This is what his Lordship said:

> Dari apa yang dinyatakan di dalam laporan nilaian penilai pemohon yang tidak disangkal H oleh penilai responden bahawa pengambilan tanah terlibat berlaku selepas kerja-kerja tapak bermula dan dengan itu saya mendapati nilai harga perbandingan di dalam laporan nilaian itu tidak lagi mencerminkan kadar nilai semasa yang sebenar lagi.
>
> *In English:*
>
> From what is stated in the applicant's valuation report, which is not disputed by the I respondent's valuer, the scheduled land was acquired after earth works had commenced and thus, I find that the value of the comparables in the said valuation report does no longer reflect the present market value.

[51] His Lordship further continued:

> Di atas alasan yang saya nyatakan di atas, penilai pemohon telah mengemukakan nilaian secara 'projection' untuk mendapatkan kadar nilai pasaran semasa. Saya bersetuju dengan Peguam Kanan Persekutuan bahawa cara ini tidak berapa sesuai dan jarang digunakan tetapi di dalam keadaan kes rujukan ini saya mendapati ia adalah yang terbaik. Penilai responden tidak mengemukakan cara alternative kecuali cara perbandingan yang telah saya nyatakan tidak lagi mencerminkan kadar nilai semasa sebenar.
>
> *In English:*
>
> For the reasons abovestated, the applicant's valuer had adopted a 'projection' valuation method to appraise the present market value. I agree with the Senior Federal Counsel that this method is not suitable and rarely used. But in this particular land reference, I am of the opinion that it is the best method. The respondent's valuer also does not suggest any alternative method except for the comparative method which as I have stated earlier, no longer reflect the actual market value.

[52] The learned trial judge, in his judgment at pp 30–31 of the appeal record also referred to the valuation report produced by the respondent's valuer and had this to say:

> Di perenggan 11 pula penilai responden menyatakan seperti berikut:
>
> 11.0 PENPAPAT TENTANG NILAIAN:
>
> Daripada pemerhatian yang telah dibuat di kawasan sekitar lot-lot terlibat dan analisis pindahmilik yang berlaku didapati bahawa kawasan ini adalah merupakan kawasan yang berpotensi untuk dimajukan sebagai kawasan pusat pelancongan. Oleh itu nilai hartanah terlibat seharusnya melambangkan nilai potensinya.
>
> Pindahmilik yang berlaku terhadap PTD 61, PTD 62 dan Lot 774, menunjukkan bahawa harga pasaran bagi lot-lot kecil di sekitar kawasan Sebana Resort ini adalah antara RM74,100–RM86,500 sehektar. Harga tersebut dirasakan munasabah berdasarkan harga pindahmilik tanah-tanah pendalaman di kawasan kampong yang bersempadan dengan Pengerang Estate (telah dicadangkan untuk pembangunan 'golf resort', kondominium dan Iain-lain) telah bertukar tangan dengan harga antara RM81,556–RM91,325 sehektar.
>
> Setelah mempertimbangkan faktor-faktor yang mempengaruhi nilai, didapati lot-lot 572 dan 1009 adalah sebanding dengan Lot 774, PTD 61 dan PTD 62. Oleh kerana PTD 61 dan PTD 62 terletak bersempadan dengan lot terlibat dan Sebana Resort maka dirasakan la adalah perbandingan yang paling sesuai. Oleh itu dicadangkan nilai RM74,100 sehektar bagi Lot 572 dan 1009. Lot 1063 pula disyorkan nilaian sebanyak RM41.200/- sehektar.
>
> *In English*
>
> At paragraph 11, the respondent's valuer stated as follows:
>
> 11.0 OPINION ON THE VALUATION
>
> From the observations made in the area surrounding the scheduled land and the analysis of earlier transfers, it is observed that this particular land area has a potential to be developed as a tourist centre. Thus, the market value should reflect its potential value.

Transfers involving PTD 61, PTD 62 and Lot 774, indicate that the market value for smaller lots in or around the Sebana Resort is between RM74,100–RM86,500 per hectare. These prices are considered reasonable based on the prices paid for the sale and transactions of interior 'kampong' lots bordering Pengerang Estate (proposed to be developed as a 'golf resort', condominium, etc) which are in the region of RM81,556–RM91,325 per hectare.

Having considered all factors affecting market value, it is found that Lots 572 and 1009 are comparable with lots 774, PTD 61 and PTD 62. As PTD 61 and PTD 62 are located adjacent to the scheduled land and the Sebana Resort, they are considered as the most suitable comparables. Thus, it is proposed that the value RM74.100 per hectare be given for lots 572 and 1009. As for lot 1063 it is suggested a value of RM41,200 per hectare.

[53] The learned trial judge having adopted the 'projection method' as suggested by the respondent's valuer remarked as follows in his judgment (see p 35 of the appeal record);

Saya telah meneliti kadar nilai pasaran semasa yang dibuat oleh penilai pemohon seperti yang dinyatakan di atas, saya dapati bahawa kadar nilai pasaran semasa yang diperolehi adalah terlalu tinggi. Kadar nilai yang diberikan adalah berasaskan penjualan tapak rumah di Sebana Resort. Di dalam laporan nilaian itu tidak ada dinyatakan penolakan bagi kos pecahmilik, tukar syarat dan kerja-kerja 'survey' untuk memecahbahagi tanah terlibat. Kos yang paling tinggi pada pendapat saya ialah menimbun bahagian yang berpaya iaitu 40% dari luas keseluruhan tanah terlibat. Di samping itu terdapat perbelanjaan sampingan seperti pengiklanan dan sebagainya.

Untuk semuanya itu saya perlu mengurangkan kadar nilai yang diberi oleh penilai pemohon sebanyak 30%. Dengan itu saya menetapkan kadar nilai semasa tanah terlibat ialah RM4.80 satu kaki persegi.

In English

Having examined the proposed present market value of the appellant's valuer above, I am of the view that they are too high. The market value given was based on the sales of housing lots in Sebana Resort. In the valuation report, nothing is mentioned about reduction in costs incurred for partition, conversion and survey works for the purpose of subdivision of the scheduled land. The highest cost involved, in my opinion, would be in filling up the swampy area which forms 40% of the scheduled land. In addition to that, there would be other incidental expenses such as for advertisement etc.

For all the above expenses, I would have to reduce the market value suggested by the applicant's valuer by 30%. In the result, I would fix the current market value of the scheduled land at RM4.80psf.

[54] The respondent's valuer, in his valuation report which was considered by the learned trial judge, had valued the scheduled land at RM7psf (see p 34 of the appeal record).

[55] On the facts and in the circumstances of this case, we ask ourselves whether the learned trial judge was right in adopting the 'projection method' in arriving at the valuation of the scheduled land.

[56] As we have mentioned earlier in para 51, the learned trial judge himself had admitted that the 'projection method' was not a suitable method to adopt and for that reason it was rarely used.

[57] Next, on the authority of *Ng Tiou Hong v Collector of Land Revenue, Gombak* which was also quoted by the learned trial judge in his judgment, the safest guide is evidence of sales of similar lands of similar quality or position in the locality at or prior to the time of acquisition. The prices paid for such sales can be used as comparables subject to making allowances for all the circumstances.

[58] Here, in this appeal, three pieces of land, ie Lot PTD 61, PTD 62 and PTD 774 were furnished as comparables for consideration by the learned trial judge.

[59] In our judgment, we must say, with the greatest of respect to the learned trial judge, that these three pieces of land are the best comparables and they should have been considered by him. We say so for the following reasons.

[60] First, we observe that these comparables are in the same area or locality as the scheduled land.

[61] Second, these comparables share the same category of land use as the scheduled land, ie agriculture.

[62] Third, the size of each of these comparables is approximately the same as the scheduled land.

[63] Fourth, we note that there is a very slight difference in time as regards the transactions of these comparables compared to the scheduled land. Lot 774, measuring about 3.738 hectares was sold on 11 February 1993 for RM35.000 per acre (RM52,000 per hectare) whilst the scheduled land was valued by the Appellant's valuer on 30 November 1993. Lots PTD 61 and PTD 62 were transacted on the same date, ie 16 December 1992. It is reasonable, therefore, to say that the scheduled land was acquired about one year after the comparables were transacted. It must also be pointed out that Lot 774 is a common comparable i.e a comparable considered by both valuers.

[64] Given the fact that these comparables are in every aspect similar to the scheduled land, we find that the learned trial judge's failure to adopt the 'comparison method' amounts to a misdirection which in turn has fatally affected his decision with respect to the value of the scheduled land (see *Ng Tiou Hong v Collector of Land Revenue, Gombak*; *Nanyang Manufacturing Co v The Collector of Land Revenue, Johore* [1954] 20 MLJ 69 and *Lee Chee Cheng & Ors v Pentadbir Tanah Daerah Seberang Perai Tengah, Bukit Mertajam* [1999] 4 MLJ 213).

Ground (f)

[65] On this ground, the learned SLA contended that the learned trial judge erred in law and in fact when he held that the value of land within the vicinity had increased instantly because of the approval given for a tourist centre known as Sebana Resort (see p 27 of the appeal record) even though there was no evidence to show as such.

[66] Having perused the records before us and considered the submission of the learned SLA, we are inclined to agree with his submission that the above finding of fact by the learned trial judge is not in any way supported by any evidence and remains a mere presumption on his part.

Ground (g)

[67] The learned trial judge in his judgment at p 31 of the appeal record found as a fact that in determining the market value of the scheduled land, the appellant's valuer failed to take into consideration its potential for development.

[68] This is what his Lordship said:.

> Dari apa yang dinyatakan di atas penilai responden mengakui tanah-tanah di kawasan sekitar tanah terlibat adalah mempunyai potensi untuk dibangunkan sebagai pusat pelancongan. Sungguhpun penilai responden mengakui potensi tanah terlibat dimajukan tetapi untuk mendapatkan kadar pasaran semasa tanah terlibat, penilai responden tidak langsung mengambilkira potensi tanah terlibat untuk dimajukan terutama sekali sebagai pusat pelancongan.
>
> *In English*
>
> From what is stated above, the respondent's valuer admitted that the land surrounding the scheduled land have the potential to be developed as a tourist centre. Although the respondent's valuer recognized this factor he failed to consider it when assessing the market value of the scheduled land.

[69] The learned SLA, however, drew our attention to the valuation report of the government valuer at see pp 74–77 of the appeal record. At para 8.0 on p 74 the report reads as follows:

> Semakan daripada Jabatan Perancang Bandar dan Desa Negeri Johor, Johor Bahru mendapati bahawa belum ada sebarang permohonan untuk membangunkan lot-lot terlibat. Walau bagaimanapun sebarang permohonan untuk memajukan lot-lot tersebut untuk pembangunan pusat pelancongan mungkin dipertimbangkan.
>
> Faktor ini adalah berdasarkan kepada kelulusan yang telah diberikan kepada Lot 1021 dan 560 untuk pembangunan pusat pelancongan.
>
> *In English*
>
> A search from Jabatan Perancang Bandar dan Desa Negeri Johor, Johor Bahru revealed that there was no application made to develop the scheduled land. Nevertheless, any application made to develop the scheduled land as a tourist centre might be given due consideration.
>
> This factor is based on the approval given to Lots 1021 and 560 for the development as a tourist centre.

[70] Further at para 11.00 on page 76, the report says:

> Daripada pemerhatian yang dibuat di kawasan sekitar lot-lot terlibat dan analisis pindahmilik yang berlaku didapati bahawa kawasan ini adalah merupakan kawasan yang

berpontensi untuk dimajukan sebagai kawasan pusat pelancongan. Oleh itu nilai harta tanah terlibat seharusnya melambangkan nilai potensinya.

In English

From the observations made on the areas surrounding the scheduled land and the analysis of transfers already transacted this area is found to have potential to be developed as a tourist centre. Therefore the value of the scheduled land should reflect its potential value.

[71] From the above quoted paragraphs, there is absolutely no doubt in our minds that in his assessment of the value of the scheduled land, the government valuer had positively taken into consideration its potential for development. This certainly is in conformity with the settled principle that potentiality is a factor to be taken into account in assessing the market value of the scheduled land. However, potential value and market value are not two separate items which must be determined separately and added to one another. Market value should include potential value (see *Collector of Land Revenue, Kuantan v Noor Chahaya bte Abdul Majid* [1979] 1 MLJ 180).

[72] In our opinion, it is therefore wrong for the learned trial judge to have said that the government valuer had failed to take into account the potential of the scheduled land in assessing its value.

Ground (h)

[73] It was submitted by the learned SLA that the learned trial judge had erred in law and in fact when he based his assessment on the sale of bungalow lots in Sebana Resort to arrive at the market of the scheduled land. His assessment was clearly wrong, unfounded and arbitrary.

[74] Upon perusal of the records available before us, we find that this submission is not without merits.

[75] We notice that these bungalow lots referred to by the learned trial judge do not possess the same similarities as the scheduled land in all aspects. As such, they do not represent proper comparables to the scheduled land.

[76] In the first place, the scheduled land is agricultural land most of which is covered with secondary jungle. Four hectares of it, which forms about 40% of the total area, is waterlogged.

[77] Secondly, in terms of time, the transformation of these bungalow lots took place between 1994–1995, whereas the valuation by the appellant's valuer took place on 30 November 1993 and the respondent's valuation was done on 7 December 1995.

[78] Thirdly, in terms of size, these bungalow lots are much smaller, ie about half an acre each as compared to the scheduled land which is 21a 2r 20p (8.7513 hectares).

[79] Next, it must also be taken into consideration that the sale of these bungalow lots took into account the infrastructure and the amenities already developed for the 'Pusat Pelancongan' whilst the scheduled land is still agricultural land and is accessible only by a laterite road.

[80] In so far as the bungalow lots are concerned, there are a number of factors which have to be taken into account. They include such things as development costs such as payment of premiums, payments for subdivision and infrastructure, survey, advertisement and development fees. No costs or payments need to be expended for the scheduled land which is still agricultural in nature.

[81] Taking into account the above factors, we are of the view that, the 'projection method' employed by the learned trial judge is not a suitable and proper method in the circumstances of this case. It resulted in a great disparity in terms of the market value between the scheduled land and the 'comparables'. Such a result would certainly cause injustice to the appellant.

CONCLUSION

[82] Based on the reasons already given above, we are unanimous that this appeal be allowed with costs. In the result, we would set aside the order made by the learned trial judge and restore the order made by the land administrator which is RM16,370 per acre (RM0.38psf) making a total of RM360,554. The deposit is to be refunded to the appellant.

[83] My learned brothers Abdul Malek Ahmad PCA and PS Gill FCJ have seen this judgment in draft and have expressed their agreement with it.

Respondents' application dismissed with costs. Appellant's appeal allowed.

Reported by John Paul Simon